IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Court's order whether the case is or not approved for reporting

(Chapter VIII, Rule 32(2) (b))

Description of case

No. 1530 (M/S) of 2001, decided on 24.10.2002

State of U.P. through Additional Director
Provincial Engineers Training Institute
Irrigation Department Kalagarh Vs.
Prising Officer Labour Court & others.

Vs.

Rent Control & Eviction Officer, Dehradun----Respondents
and another.

A.F.R. (Approved for reporting)
Not approved for reporting

Date 24.10.2002

Initials of Judge

Note- Bench Reader will attach this at the top of the first page of the judgment when it is put up before the Judge for signature.

RESERVED

Court No.2

Civil Misc. Writ Petition No. 1530 (M/S) of 2001
(Old No. 35027/1999)

State of U.P. through Additional Director
Provincial Engineers Training Institute
Irrigation Department, Kalagarh. ….. Petitioner

Versus

Presiding Officer, Labour Court
and another. ….. Respondents.

……..

Hon'ble P.C. Verma, J.

By means of this writ petition, petitioner has challenged the impugned award dated 25.11.1998 passed by the Labour Court in Industrial Dispute Case No.204 of 1998, which was notified on 26.5.1999.

Prior to the reorganization of existing State of Uttar Pradesh, a dispute was referred, vide notification No. 3484-89 (Labour Commissioner)/36-Labour(1) C.B. 13/37 Dehradun, dated 31.8.1998, containing a list of 16 daily wages as its annexure, which was registered as Industrial Dispute No.204 of 1998. The reference was made in the following terms:-

> Whether non-regularisation of 16 daily wages workmen with effect from 20.2.1997 by the employers was illegal and unjustified? If so, to what relief the workmen are entitled and to what consequential benefits?

The dispute was raised by the workmen of Provincial Irrigation and Dam Project Workers Federation, Kalagarh. Notices were issued to the parties. They filed their written statements and objections and led their evidence before the Labour Court.

According to the workmen, they were working on muster-roll on daily wages engaged from different dates during the year 1989 to 1995 and were entitled to be regularized in compliance of the Government Order dated 07.02.1997 with effect from 20.02.1997 on the work charge establishment and were also entitled to the benefit of the judgment passed by the Hon'ble Supreme Court in **Writ Petition No.140 of 1989, Raj Narain Prasad and others versus State of U.P. and others, reported in (1998) 8 Supreme Court Cases, page 473.**

The employers pleaded before the Labour Court that these 16 (sixteen) persons never worked on muster roll and Kalagarh is a Training Institute runs different training schemes and projects. Therefore, it does not fall within the definition of 'Industry'. The Tribunal has dealt these two objections categorically. On the objection No.1, the Industrial Tribunal has recorded a finding on the basis of statement made by witness Jaipal Singh Produced by the employers that the nature of work done by these workmen was of perennial in nature.

The Tribunal relied on the Government Order dated 07.02.1997, by which it was directed that those workmen who have completed 240 days from 01.01.1993 they should be taken on work charge establishment and recorded a finding that these workmen have completed 240 days. Therefore, they are entitled to be regularized on work charge establishment.

On the record objection of the employers that 'Institute' is Training Institute and does not fall within the definition of Industry. The Tribunal relying on the case of **Bangalore Water Supply and Sewerage Board versus A. Rajappa, reported in A.I.R. 1978, S.C., 548,** held that Irrigation Department is an Industry and Institute run by the Irrigation Department is an 'Industry'. On the basis of the aforesaid finding, the Tribunal gave the impugned award that non-regularisation of

all the 16 workmen on the work charge establishment was illegal and unjustified and directed the employers to regularize them from 20.2.1997 on the work charge establishment and to gave them consequential benefits.

The petitioners have challenged the award on the ground that the petitioner's establishment is a Department of Irrigation which is giving higher education and training to working Engineers and does not fall within the definition of 'Industry'. That the Government Order dated 07.02.1997 was applicable only in case of work charge employees and since the respondents were not on work charge establishment, therefore, benefit of Government Order dated 07.02.1997 was wrongly given. It was clearly established before the Labour Court that these respondents were working as contract labour. The learned Standing Counsel vehemently argued that the Irrigation Department is not an 'Industry' and the institute was a Training Institute, even otherwise it cannot be held to be an 'Industry'. He relied on a judgment of the apex Court in a case of **the Executive Engineer (State of Karnataka) versus K.Somasetty and others, reported in A.I.R. 1997, Supreme Court, page 2663** in which the apex Court held as under:-

> "It is now well-settled legal position that the Irrigation Department and Tele-communication Department are not an 'Industry' within the meaning of definition under the Industrial Disputes Act as held in *Union of India v. Jai Narain Singh, and in State of H.P. v. Suresh Kumar Verma.* The function of public welfare of the State in a sovereign function. It is the constitutional mandate under the Directive Principles, that the Government should bring about welfare State by all executive and legislative actions. Under these circumstances, the State is not an 'Industry' under the Industrial Disputes Act. Even otherwise, since the project has been closed, the respondent has no right to the post since he had been appointed on daily wages".

The apex Court in the case **Coir Board Erankulam, Cochin and others versus Indira Devi P.S. and others, reported in 2000 Supreme Court Cases (L & S), page 120** after noticing the conflict in the

judgment of Hon'ble two Judges, referred the matter to the Hon'ble Chief Justice of India for a decision by larger Bench. The larger Bench by a short order rejected the reference and held that judgment delivered by seven-Judge Bench in **Bangalore Water Supply and Sewarage Board versua A. Rajappa (**Supra**)** does not require consideration on a reference made by a two-Judge Bench. The order is reproduced as under:-

> "We have considered the order made in Civil Appeals Nos. 1720-21 of 1990. The judgment in *Bangalore Water Supply & Sewerage Board v. A. Rajappa* was delivered almost two decades ago and the law h as since been amended pursuant to that judgment though the date of enforcement of the amendment has not been notified.
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> The judgment delivered by seven learned Judges of this Court in *Bangalore Water Supply case* does not, in our opinion, require any reconsideration on a reference being made by a two-judge Bench of this Court, which is bound by the judgment of the larger Bench."

The submission of the learned counsel for the petitioners that Kalagarh unit of the Irrigation Department being a Training Institute does not fall within the definition of Industry and the learned counsel relied on the judgment of the apex Court in the case of **Management of Safdar Jung Hospital, New Delhi versus Kuldip Singh Sethi, reported in AIR 1970 Supreme Court, 1407.**

The Safdar Jung Hospital's case in which it was held by the majority of six-Judges that,

> "It is obvious that Safdarjung Hospital is not embarked on an economic activity which can be said to be analogous to trade or business. There is no evidence that it is more than a place where persons can get treated. This is a part of the functions of Government and the Hospital is run as a Department of Government. It cannot, therefore, be said to be an industry. The Tuberculosis Hospital is not an independent institution. It is a part of the Tuberculosis Association of India. The hospital is wholly charitable and is a research institute. The dominant

purpose of the hospital is research and training, but as research and training cannot be given without beds in a hospital, the hospital is run. Treatment is thus a part of research and training. In these circumstances the Tuberculosis Hospital cannot be described as industry."

The Safdarjung Hospital's case was reconsidered by the seven-Judge Bench in Bangalore Water Supply and Sewerage Board versus A. Rajappa (Supra) and in para-157 of the report held as under:-

"We have adduced enough reasons in the various portions of this judgment to regard hospitals, research institutions and training centers as valuable material services to the community, qualifying for coming within S.2 (j). We must plainly state that vis-à-vis hospitals, Safdarjung (AIR 1970) was wrong and Hospital Mazdoor Sabha was right."

In Para-161 the following principles were also laid down:-

'Industry', as defined in Section 2 (j) and explained in Banerjee (AIR 1953 SC 58) has a wide import.

(a) where (i) systematic activity, (ii) organized by cooperation between employer and employees (the direct and substantial substance is chimerical) (iii) for the production and/or distribution of goods and services calculated to satisfy human wants and wishes (not spiritual or religious, but inclusive of material things or services geared to celestial bliss, i.e. making, on a large scale Prasad or food) prima facie, there is an industry in that enterprise.

(b) Absence of profit motive or gainful objective is irrelevant, be the venture in the public, joint, private or other sector.

(c) The true focus in functional and decisive test is the nature of the activity with special emphasis on the employer-employee relations.

(d) If the organization is a trade or business it does not cease to be one because of philanthropy animating the undertaking.

II Although S.2 (j) uses words of the widest amplitude in its two limbs, there meaning cannot be magnified to overreach itself.

(a) 'Undertaking' must suffer a contextual and associational shrinkage as explained in Bajerji and in this judgment; so also, service, calling and the like. This yields the inference that all organized activity possessing the triple elements in I (supra), although not trade or business, may still be 'industry' provided the nature of the activity, viz, the employer-employee basis, bears resemblance to what we find in trade or business. This takes into the fold 'industry' undertakings, callings and services, adventures 'analogous to the carrying on of trade or business.' All features, other than the methodology of carrying on the activity viz. in organizing the co-operation between employer and employee, may be dissimilar. It does not matter, if on the employment terms there is analogy.

III. Application of these guidelines should not stop short of their logical reach by invocation of creeds, cults or inner sense of incongruity or outer sense of motivation for or resultant of the economic operations. The ideology of the Act being Industrial peace, regulation and resolution of industrial disputes between employer and workman, the range of this statutory ideology must inform the reach of the statutory definition. Nothing less, nothing more.

(a) The consequences are (i) professions, (ii) Clubs (iii) educational institutions (iv) cooperatives, (v) research institutes (vi) charitable projects and (vii) other kindred adventures, if they fulfill the triple tests listed in I (supra), cannot be exempted from the scope of Section 2 (j).
(b) a restricted category of professions, blubs, co-operatives and even gurukulas and little research labs, may qualify for exemption if, in simple ventures, substantially and, going by the dominant nature criterion, substantively, no employees are entertained but in minimal matters, marginal employees are hired without destroying the non-employee character of the unit.
(c) If, in a pious or altruistic mission many employ themselves, free or for small honoraria or like return, mainly drawn by sharing in the purpose or cause, such as lawyers volunteering to run a free legal services clinic or doctors serving in their spare hours in a free medical center or ashramites working at the binding of the holiness, divinity or like central personality, and the services are supplied free

or at nominal cost and those who serve are not engaged for remuneration or on the basis of master and servant relationship, then, the institution is not an industry even if stray servants, manual or technical are hired. Such eleemosynary or like undertakings along are exempt- not other generosity, compassion, developmental passion or project.

IV. The dominant nature test:

(a) Where a complex of activities, some of which qualify for exemption, others not, involves employees on the total undertaking, some of whom are not 'workmen' as in the University of Delhi case (AIR 1963 SC 1873) or some departments are not productive of goods and services if isolated, even then, the pre-dominant nature of the services and the integrated nature of the departments as explained in the Corporation of Nagpur (AFIR 1960 SC 675) will be the true test. The whole undertaking will be 'industry' although those who are not 'workmen' by definition may not benefit by the status.

(b) Notwithstanding the previous clauses, sovereign functions strictly understood, (alone) qualify for exemption, not the welfare activities or economic adventures undertaken by government or statutory bodies.

(c) Even in departments discharging sovereign functions, if there are units which are industries and they are substantially severable, then they can be considered to come within S.2 (j).

(d) Constitutional and competently enacted legislative provisions may well remove from the scope of the Act categories which otherwise may be covered thereby.

We overrule Safdarjung (AIR 1970 SC 1407), Solicitor's case (AIR 1962 SC 1080), Gyamkhana (AIR 1968 SC 554), Delhi University (AIR 1963 SC 1873) Dhanraugirji Hospital (AIR 1975 SC 2032) and other rulings whose ratio runs counter to the principles enunciated above, and Hospital Mazdoor Sabha (AIR 1960 SC 610 is hereby rehabilitated."

The apex Court in **Des Raj and others versus State of Punjab and others, reported in A.I.R. 1988 S.C., 1182,** after applying the

aforesaid text on the nature and activities carried on by the Irrigation Department held that Irrigation Department is an 'Industry'.

Since the Kalagarh unit is the branch of Irrigation Department therefore, the same is also an Industry within the definition of 'Industry' under the U.P. Industrial Disputes Act in view of the law laid down by the apex Court in **Bangalore Water Supply & Sewerage Board versus A.Rajappa's** case.

The second submission of the learned Standing Counsel was that the respondents engaged through contractor, therefore they do not fall within the definition of workmen. hence the award is bad.

The learned counsel for the respondents submitted that the Tribunal has recorded a categorical finding that the work taken from the respondents are perennial in nature. According to the petitioner's witness Jaipal Singh, the respondents wee employees through contractor because the Government banned the engagement on the muster roll. He submitted that the definition of the workmen and the employer in the U.P. Industrial Disputes Act are wide enough to cover the cases like of the respondents.

Section 2 (i) of the U.P. Indsutrial Disputes Act is as under:-

(ii) **'Employer'** includes-

(i) an association or a group of employers;

(ii) where an industry is conducted or carried on by a department of the State Government, the authority specified in that behalf, and where no such authority has been specified, the head of such department;

(iii) where an industry is conducted or carried on by or on behalf of a local authority, the chief executive officer of such authority;

(iv) where the owner of any industry in the course of or for the purpose of conducting the industry contracts with any person for the execution by or under such person of the whole or any part of any work which is ordinarily part of the industry, the owner of such industry;

Section 2 (z) of the U.P. Industrial Disputes Act is as under:-

"(z) **'Workman'** means any person (including apprentice) employed in any industry to do any skilled or unskilled manual, supervisory, technical or clerical work for hire or reward, whether the terms of employment be express or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharged or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person-

(i) who is subject to the Army Act, 1950 or the Air Force Act, 1950, or the Navy (Discipline) Act, 1934; or

(ii) who is employed in the police service or as an officer or other employee of a prison; or

(iii) who is employed mainly in a managerial or administrative capacity; or

(iv) who, being employed in a supervisory capacity, draws wages exceeding five hundred rupees per mensem or exercise, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature.

Relying on these two definitions, the apex Court considering these two definitions in the case of *M/s Basti Sugar Mills Ltd. versus Ram Ujagar and others, reported in A.I.R. 1964 S.C., 355 (Constitution Bench) in Para 6 & 7* held as under:-

"Section 2(i) of the Act contains an inclusive definition of employer. The effect of sub-cl.(iv) of S.2(i) is that where the owner of any industry in the course of or for the purpose of conducting the industry contracts with any person for the execution by or under such person of the whole or any part of any work which is ordinarily a part of the industry, the owner of such industry is an employer with the meaning of the Act. Mr. Pathak' suggestion that the effect of this definition is that the owner of the industry becomes the employer of the contractor wholly untenable and can even be described as fantastic to deserve serious consideration. The obvious purpose of this extended definition of the word "employer" is to make the owner of the industry, in the circumstances mentioned in the sub-clause, the employer of the workmen engaged in the work which is done through contract. The words used in the sub-clause are clearly sufficient to achieve this purpose.

It is true, as pointed out by Mr.Pathak, that the definition of the word "workmen" did not contain any words to show that the contract labour was included. That however does not affect the position. The words of the definition of workmen in S.2(z) to mean "any person (including an apprentice) employed in any industry to do any skilled or unskilled, manual, supervisory, technical or clerical work for hire or reward, whether the terms or employment be express or implied" are by themselves sufficiently wide to bring in persons doing work in an industry whether the employment was by the management or by the contract or of the management. Unless however the definition of the word "employer" included the management of the industry even when the employment was by the contractor the workmen employed by the contractor could not get the benefit of the Act since a dispute between them and the management would not be an industrial dispute between "employer" and the workmen. It was with a view to remove this difficulty in the way of workmen employed by contractors that the definition of employer has been extended by sub-cl. (iv) of S.2(i) the position thus is : (a) that the respondents are workmen within the meaning of S.2 (z), being persons employed in the industry to do manual work of reward, and (b) they were employed by a contractor with whom the appellant company had contracted in the course of conducting the industry for the execution by the said contractor of the work of removal of press-mud which is ordinarily a part of the industry. It follows therefore from S.2(z) read with sub-cl.(iv) S.2(i) of the Act that they are workmen of the appellant company and the appellant company is their employer. There is no substance therefore in the first point raised by the learned counsel for the appellant."

The another Constitution Bench in the case of **Steel Authority of India Ltd. and Ors. etc.etc. versus National Union Water Front Workers and Ors. etc. etc., reported in A.I.R. 2001, S.C.W. 3574** has held that,

> "The decision of the Constitution Bench of this Court in Basti Sugar Mill's case (supra) was given sin the context of the reference of an industrial dispute under the Uttar Pradesh Industrial Disputes Act, 1947. The appellant-Sugar Mills entrusted the work of removal of press mud to a contractor who engaged the respondents therein (contract labour) in connection with that work. The services of then respondents were terminated by the contractor and they claimed that they should be re-instated in the service of the appellant. The Constitution Bench held,
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> > "The words of the definition of workmen in Section 2(z) to mean "any person (including an apprentice) employed in any industry to do any skilled or unskilled, manual, supervisory, technical or clerical work for hire or reward, whether the terms of the employment be express or implied" are by themselves sufficiently wide to bring in person doing work in an industry whether the employment was by the management or by the contractor of the management. Unless however the definition of the word "employer" included the management of the industry even when the employment was by the contractor the workmen employed by the contractor could not get the benefit of the act since a dispute between them and the management would not be an industrial dispute between "employer' and workmen. It was with a view to remove this difficulty in the way of the workmen employed by contractors that the definition of employer has been extended by sub-clause (iv) of Section 2(i). The position thus is:
> >
> > (a) that the respondents are workmen within the meaning of Section 2(z), being persons employed in the industry to do manual work for reward, and
> >
> > (b) they were employed by a contractor with whom, the appellant company had contracted in the course of conducting the industry for the execution by the said contractor of the work of the removal of press-mud which is ordinarily a part of the industry. It follows

> therefore from Section 2(z) read when sub-clause (iv) of Section 2(i) of the act that they are workmen of the appellant company and the appellant company is their employer."

It is evident that the decision in that case also turned on the basis wide language of statutory definitions of the terms "workmen" and "employer". So it does not advance the case pleaded by the learned counsel."

Thus, in view of the above settled position, it is held that the respondents are workmen within the meaning of provisions of U.P. Industrial Disputes Act.

The last question as to whether the respondents-workmen are entitled to be regularised in view of the Government Order dated 07.02.1997. Since the establishment has been held to be an "Industry" and the respondents have been held to be workmen and they have completed 240 days and they are working from different dates during the period 1989 to 1995, therefore, even if the Government Order is not applicable, the respondents are entitled to be regularized.

Thus, the challenge by the petitioner fails. The petition is dismissed. No order as to costs.

(P.C. Verma, J.)

24.10.2002
P.Singh